97-1625

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

CALIFORNIA DENTAL ASSOCIATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN COLLEGE FOR ADVANCEMENT IN MEDICINE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, under Section 4 of the Federal Trade Commission Act, the Commission's jurisdiction over entities "organized to carry on business for [their] own profit or that of [their] members" extends to nonprofit professional associations.

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INTEREST OF *AMICUS CURIAE*

The American College for Advancement in Medicine (ACAM) is a nonprofit medical society dedicated to scientific, educational and public health purposes. Membership in ACAM requires an unrestricted license to practice medicine, and ACAM has more than 1,000 member physicians in the U.S. and worldwide.[1/] As set forth in its Articles of Incorporation, ACAM is organized solely for nonprofit purposes. Its founding documents prohibit ACAM from "operat[ing] for pecuniary gain or profit" and from distributing any gains, profits or dividends to its members.[2/]

ACAM's activities, all of which are directed toward its scientific, educational and public health purposes, consist of

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1/ Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.2(a) of the Rules of this Court, *amicus* states that both parties have granted written consent to the filing of this brief. The parties' consent letters have been filed with the Clerk of the Court.

2/ ACAM's Articles of Incorporation state in pertinent part:

> This corporation is not organized, nor shall it be operated for pecuniary gain or profit, and it does not contemplate the distribution of gains, profits, or dividends to its members and is organized solely for nonprofit purposes. The property, assets, profits and net income of this corporation are irrevocably dedicated to scientific and educational purposes, and no part of the profits or net income of this corporation shall ever enure to the benefit of any director, officer, or member or to the benefit of any private shareholder or individual.

educating physicians, advancing and supporting scientific research, and developing public awareness of emerging therapies in complementary/alternative medicine and preventive medical practices. ACAM is an accredited sponsor of the Accreditation Council for Continuing Medical Education (ACCME). ACAM does not sponsor or conduct programs or courses on medical practice management or other subjects involving the business as opposed to the medical and scientific interests of its members. ACAM does not offer insurance or retirement benefits to its members; it does not offer its members credit cards, legal or financial services; and it does not have a lobbying program. ACAM does not generate any unrelated business income. In sum, ACAM is organized and operates as a *bona fide* nonprofit medical society.

ACAM is keenly interested in the jurisdictional issue now before the Court, not only because it, like petitioner California Dental Association (CDA), is a nonprofit professional association but also because ACAM has been, for the past three years, the subject of a Federal Trade Commission law enforcement investigation. The effect of the Commission's investigation has been to deplete ACAM funds; divert financial and human resources away from its scientific, educational and public health goals; and inhibit the ability of ACAM and its members to engage in the free exchange of ideas concerning the use of complementary and alternative medical therapies.

The purpose of this brief is to give the Court a perspective on the jurisdictional issue that neither party can offer, and that was not presented by the other *amici* at the petition stage. Through this brief, ACAM seeks to inform the Court of some practical consequences that flow from the Commission's assertion of jurisdiction over nonprofit professional associations

– consequences that threaten principles of federalism and may adversely affect the public health.

ACAM brings a unique perspective to the Court's consideration of this critical issue in two ways. First, while ACAM shares CDA's status as a nonprofit professional association, the scope of ACAM's activities and the benefits ACAM offers to its members, both of which are described above, are substantially more limited than CDA's. The fact that the Commission seeks to exert jurisdiction over both CDA and ACAM shows that the "pecuniary benefits" test it is applying, and now advocates to the Court, is an unreasonable and unworkable interpretation of the jurisdictional limitation in Section 4 of the FTC Act. 15 U.S.C. § 44. Second, while the Commission's action against CDA is based on antitrust issues, its investigation of ACAM was initiated by the Commission's Bureau of Consumer Protection and involves allegations of allegedly unsubstantiated representations about a safe, legitimate medical treatment that has been administered by thousands of physicians for more than forty years. The Commission's position in this regard goes to the heart of the medical practices of ACAM's members and the doctor-patient relationship, and thereby implicates First Amendment and related issues that generally do not arise from the Commission's antitrust actions against nonprofit professional associations. ACAM respectfully submits that these issues are highly relevant to the jurisdictional question now before the Court.

SUMMARY OF ARGUMENT

Section 4 of the FTC Act limits the Commission's jurisdiction to entities "organized to carry on business for [their] own profit or that of [their] members" (15 U.S.C. § 44), reflecting Congress' intent to limit the Commission's jurisdiction to for-profit, commercial organizations. Contrary to the plain meaning of the statute, the Commission has created a "pecuniary benefits" test for interpreting Section 4 that has resulted in an improper expansion of its authority. The Commission has made small nonprofit associations an enforcement priority, and many such associations have acquiesced in consent orders as the only practical option for resolving the Commission's charges.

The current conflict among the circuits regarding the proper test for assessing whether an association is subject to the Commission's authority arose from cases during the past thirty years from the Eighth and Second Circuits.

Under the Eighth Circuit's test, a jurisdictional determination is based on the language of Section 4 and is reached by considering whether an association is organized to carry on "business for profit within the traditional meaning of that language." *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1018 (8th Cir. 1969). The Eighth Circuit reversed the Commission's decision that it possessed jurisdiction over the blood and hospital associations and, in so doing, rejected the Commission's analysis of jurisdiction based on an examination of the business activities of the associations.

The Second Circuit, however, adopted a similar Commission analysis that scrutinizes a "spectrum of activities" conducted by the association. *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd without opinion by an equally divided court, 455 U.S. 676 (1982). In finding that the "business aspects" of the AMA are within the Commission's jurisdiction, the court accepted the Commission's reasoning that it could use as a substitute for actual profits "pecuniary benefits" an association confers, even indirectly, on its members as a justification for exercising jurisdiction over a broad range of the association's activities.

The Ninth Circuit in the case now before the Court chose to apply the more "expansive view of 'profit'" that the Second Circuit followed in *AMA*. *California Dental Assn. v. FTC*, 128 F.3d 720 (9th Cir. 1997).

The "spectrum of activities"/"pecuniary benefits" analysis departs from the clear meaning of Section 4 and permits the Commission to exert jurisdiction over virtually any activity of any association. The *AMA* and *CDA* courts included a very broad range of activities among those that can confer "pecuniary benefits" on members -- including activities that primarily benefit the public, but may also be beneficial to the association's members. In its investigation of ACAM, the Commission based its assertion of jurisdiction on activities it had previously told the courts were "non-entrepreneurial" and thus outside its jurisdiction. Moreover, even when those activities were shown to represent only two to three percent of ACAM's total budget, the Commission still adhered to its jurisdictional determination.

The Commission's failure to observe the constraints of Section 4 has encouraged the agency to involve itself in "practice of medicine" issues, even though it told Congress it would not interfere in those areas that are the responsibility of the states.

The *Community Blood Bank* test is a proper interpretation of Section 4 of the FTC Act. Nevertheless, it still leaves open to question the kinds of activities that might bring a nonprofit association within the jurisdiction of the Commission. The Court should clarify the distinction between profit-making activities and nonprofit services, which are especially difficult to distinguish in the context of professional associations, and instruct the Commission to follow a clarified *Community Blood Bank* test in assessing its jurisdiction under Section 4.

ARGUMENT

I. THE "PECUNIARY BENEFITS" TEST IS INCONSISTENT WITH THE NARROW BASIS FOR JURISDICTION OVER NONPROFIT ASSOCIATIONS DEFINED IN SECTION 4 OF THE FTC ACT AND PERMITS THE COMMISSION TO IMPROPERLY EXPAND ITS AUTHORITY

Section 4 of the FTC Act limits the Commission's jurisdiction to entities "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. Section 4 reflects Congress' intent to limit the Commission's jurisdiction to for-profit, commercial organizations. Despite the fact that neither the statutory language itself nor the legislative history of Section 4 supports a narrow application of this nonprofit jurisdictional limitation, the Commission has created

a "pecuniary benefits" test for interpreting Section 4 that permits it to take an extraordinarily expansive view of its authority. In so doing, it has strayed far from the role Congress intended it to play in regulating the activities of nonprofit entities. Indeed, the Commission has made the investigation of relatively small nonprofit associations an enforcement priority in recent years.

Most of the Commission's association cases, like its investigation of ACAM, culminate in consent orders. Acquiescence in a consent order is most often the only practical option for nonprofit organizations who operate on shoestring budgets that do not reflect the important services they often provide to the public as well as their members. The budget of a small association like ACAM, for example, simply cannot support a challenge to the Commission's jurisdiction, much less a full-blown defense to Commission charges. Of the Commission's litigated cases against nonprofit associations, the issue of jurisdiction has been raised in very few. The Commission's opposition to CDA's petition for a writ of *certiorari* includes within a "long line of cases" cited as support for its position those cases in which jurisdiction was not contested. Opp. 16 n.5. Clearly, however, the fact that jurisdiction was not challenged in a particular case cannot lend credence to the Commission's view that a real conflict over the proper interpretation of Section 4 does not exist. Any number of reasons could explain why the issue was not raised or litigated, including budgetary constraints and the nature of the organization itself, since not all nonprofit associations are exempt from the Commission's jurisdiction.

The current conflict over the Commission's nonprofit jurisdiction arose from cases during the past thirty years from

the Eighth and Second Circuits. The first was decided in 1969, when the Eighth Circuit addressed the question of the Commission's authority over hospital and blood bank associations. The court made its jurisdictional determination by considering whether the associations were organized to carry on "business for profit within the traditional meaning of that language." *Community Blood Bank* at 1018, emphasis added. An important part of the court's determination was its conclusion that engaging in some business activities does not bring a nonprofit association within the Commission's jurisdiction. *Id.* at 1019. A decade later, in a case involving the American Medical Association (AMA), the Second Circuit applied a very different test that relied not on the traditional meaning of the statutory language, but strictly on a new characterization of a "spectrum of activities" in which nonprofit associations engage. In finding "[t]he business aspects of the activities of the petitioners [to] fall within the scope of the Federal Trade Commission Act" (*AMA* at 448), the court adopted the Commission's jurisdictional analysis that was based on a determination whether the association provides "tangible, pecuniary benefits" within its spectrum of activities for members. In the matter now before the Court, the Ninth Circuit applied this "spectrum of activities"/ "pecuniary benefits" test.

ACAM respectfully submits that the "spectrum of activities"/"pecuniary benefits" test is inconsistent with the plain meaning of Section 4, which defines a narrow basis for Commission jurisdiction over nonprofit associations. Moreover, it is, as a practical matter, an unworkable means of determining whether a nonprofit entity is within or outside the scope of Section 4. For the reasons described herein, this test has permitted the Commission to improperly expand its jurisdiction to the point where the Section 4 nonprofit limitation

is virtually meaningless. Despite its assurances against jurisdictional overreaching made in its briefs to the courts and before Congress, the Commission has applied its "pecuniary benefits" test in a way that can bring essentially any organization and any activity within its sphere of authority.

In *Community Blood Bank*, the Eighth Circuit specifically rejected the notion that a nonprofit association becomes a profit-making entity under Section 4 simply by engaging in some activities that a commercial enterprise engages in. The Commission had found that both the blood bank and hospital organizations "performed very valuable services" for their members that were "in the broadest sense exceedingly profitable for the doctors and the hospitals to receive." *Community Blood Bank*, 70 F.T.C. 728, 767 (1966). The hospital association was found by the Commission to be within its jurisdiction because it "is also engaged in business for the benefit or profit of its members when it supplies to them information and other services which they might otherwise have to gather and render themselves. *Id.* at 909 - 910. But the Eighth Circuit rejected the Commission's analysis and held that so long as nonprofit entities are "validly organized and existing under nonprofit corporation statutes . . . [and] do not distribute any part of their funds to and are not organized for the profit of members or shareholders" then they remain beyond the reach of the FTC. *Community Blood Bank*, 405 F.2d at 1019.

The test established by the Eighth Circuit in *Community Blood Bank:* whether the organization "engages in business for profit within the traditional meaning of that language" (*id.* at 1018) is simple, understandable and based on the wording of Section 4 itself. In rejecting the Commission's analysis of the association's activities as a basis for jurisdiction, the court

adopted the reasoning Commissioner Elman expressed in his "cogently worded" dissent from the Commission's opinion. Drawing an analogy to a "religious association [that] might sell cookies at a church bazaar," Commissioner Elman had recognized that activities such as selling blood for profit are "of no relevance" to the question of FTC jurisdiction as long as any income gained is devoted to the nonprofit purposes of the organization. *Id.* at 1019. Reversing the Commission's finding of jurisdiction, the court quoted Commissioner Elman's criticism of the "clear import of the Commission's holding . . . [as reading] Section 4 out of the Act altogether and hold[ing] . . . that its jurisdiction under the Act embraces *all* corporations, profit and nonprofit alike, whatever the circumstances." *Id.*

In the two subsequent cases to test its jurisdiction over nonprofit associations, the Commission has escaped the jurisdictional boundaries set by the Eighth Circuit in *Community Blood Bank* by utilizing essentially the same analysis the Eighth Circuit rejected because of its potential to read Section 4 out of the FTC Act.

When *AMA* went to the Second Circuit, the Commission's brief to the court began by recognizing the limitations Section 4 imposes on its jurisdiction over nonprofit associations and by acknowledging the approach taken by the *Community Blood Bank* court. Respondent's Brief at 34-36, *AMA v. FTC.* But the Commission then departed from a basic "business for profit" test and instead described "a spectrum of association activities, ranging from the purely eleemosynary to the purely commercial" (*id.* at 32) that it would examine in deciding the jurisdictional issue. The Commission put charitable, cultural, educational and scientific activities at the "non-entrepreneurial" end of the spectrum *(id.)*, concluding that the AMA's activities

devoted "to the advancement of medical science, education and public health, and . . . [its] scientific activities" (*id.* at 38) were not profit-promoting and therefore do not count in determining whether the association engaged in more than incidental commercial activity. Turning to the commercial end of the spectrum of association activities, the Commission's brief identified "a wide variety of pecuniary benefits which AMA confers on its members" (*id.* at 37), including lobbying for government reforms, "dealing with third party payers," participating in litigation involving government policies, and rendering business advice to its members. *Id.*

In the context of this "spectrum of activities" analysis, the Commission acknowledged, as the Eighth Circuit had in *Community Blood Bank*, that every association engages in some business activities, but that those activities must be substantial before jurisdiction can attach. In its brief, the Commission offered the court assurance against jurisdictional overreaching by saying that when a nonprofit association "serves both the profit-oriented entrepreneurial interests of its members and their non-entrepreneurial interests [the association] is within the scope of Section 4 [only] with respect to its profit promoting aspects"[3/] and only when the profit-oriented activities are substantial: "The commercial part of the spectrum is subject to the FTC Act but that part must be a substantial, not incidental, portion of the whole." *Id.* (emphasis added). In practical

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3/ *Id.* at 32. At oral argument before this Court in the AMA case, the FTC confirmed this jurisdictional analysis when it said, "the Commission does not claim broad jurisdiction over nonprofit associations. It claims jurisdiction over nonprofit associations made up of entrepreneurs when those associations are engaged in substantial part in operating for the profit of those entrepreneur members." Record at 38-39, *AMA v. FTC* (No. 80-1690).

application, as ACAM's experience attests, this "substantiality" element has no more inhibited the Commission from asserting jurisdiction over nonprofit associations than has the "spectrum of activities" part of the test.

By replacing "business for profit" with a "spectrum of activities," the Commission advocated, and the Second Circuit adopted in *AMA,* a test for jurisdiction that represents a fundamental departure from the clear meaning of Section 4 that formed the basis of the *Community Blood Bank* holding. Both the Commission and the Second Circuit based their conclusions that the AMA fell within the scope of Section 4 on certain activities found to have conferred not profits but "pecuniary benefits" on the association's members. This test confounds the process of determining jurisdiction by requiring an examination of each and every "activity" an association engages in.[4/] Precisely what should count as eleemosynary rather than profit-promoting became almost impossible to divine and provoked the controversy that came to this Court in the AMA case sixteen years ago. The difficulty of analyzing a "spectrum of activities" was evident in the following exchange between this Court and counsel for the AMA:

> MR. MINOW: Would you believe that it was contended here that our continuing education programs are for the profit of our members, because if you learn something

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4/ By comparison, the Eighth Circuit in *Community Blood Bank* found that marketing activities and profit making are "of no relevance" to the issue of whether the FTC has jurisdiction as long as any income is devoted to the nonprofit purposes of the organization. (*Community Blood Bank* at 1018.)

there, you'll get more patients. That's silly . . . .

QUESTION: Is the cost of attending those programs deductible for income tax purposes?

MR. MINOW: I would think so, Justice Stevens.

QUESTION: Because they produce income.

MR. MINOW: I would think so, but I don't think that has anything to do with whether the AMA or the Connecticut Medical Society or the New Haven Medical Society were organized for the purpose of producing profit for their members. That's a different question.

QUESTION: I suppose, Mr. Minow, that if it is deductible, and I would assume that it is, it's on the same basis that a schoolteacher taking summer courses can deduct summer courses at the university.

MR. MINOW: To advance your skills or advance your – right. I would think so, Mr. Chief Justice.

QUESTION: But that isn't probably profit making except that it's profitable for the

> teacher in the long run, but we would hope for the public too.

Record at 14-16, *AMA v. FTC* (No. 80-1690).

There is no question that the continuing education of teachers, physicians, dentists, lawyers, and others who are privileged to practice a profession that serves the public may indirectly enhance the profit-making potential of those professionals. As the Court observed, however, that is not direct "profit making." Moreover, since most professional continuing education is mandatory, benefit to the public is quite clearly its principal purpose. Although the Commission mentioned the statutory nonprofit jurisdictional limitation a number of times when arguing in *AMA* in favor of its "pecuniary benefits" test, in practical effect, substitution of the "spectrum of activities" analysis for the Eighth Circuit's straightforward standard based on the language of Section 4 (whether the organization "engages in business for profit within the traditional meaning of that language") has invited the Commission to engage in exactly the kind of jurisdictional overreaching that the Eighth Circuit overruled in *Community Blood Bank*.

The difficulty the Court had in *AMA* and continuation of the same debate over the ensuing sixteen years to this day underline the fact that the "pecuniary benefits" test is an unworkable distortion of the statutory language. The case now before the Court demonstrates the need to articulate a test that clearly defines the boundaries of the Commission's jurisdiction. In affirming the Commission's conclusion that it has jurisdiction over CDA, the Ninth Circuit, like the Second Circuit in *AMA* has reverted to the approach taken by the Commission and

overruled by the Eighth Circuit in *Community Blood Bank*, thereby effectively gutting the jurisdictional exemption Congress wrote into Section 4 of the FTC Act.

In its brief to the Ninth Circuit in this case, the Commission acknowledged the statutory limitation on its jurisdiction and then defined the test, as it had in *AMA*, in terms of an examination of benefits the association provides, a characterization of the benefits as "economic" or "pecuniary" and an accounting of whether those "benefits are a 'substantial part of' [the association's] total activities." Respondent's Brief at 25, *CDA v. FTC*, 128 F.3d 720 (9th Cir. 1997). As in *AMA*, here too the Commission has identified an exceptionally broad range of activities as conferring "pecuniary benefits" – including lobbying and litigation affecting the association's members, insurance plans and practice management advice (*id.* at 24) – leading to the conclusion that CDA and its enforcement of advertising standards were within the Commission's jurisdiction.

In affirming the Commission's jurisdictional determination, the Ninth Circuit began by invoking the language of Section 4, stating that the "FTC's authority turns on whether [the CDA] is organized to carry on business for its own profit or that of its members." *CDA v. FTC*, 128 F.3d at 725. Then, although the *AMA* court had not explicitly announced a departure from the Eighth Circuit's reliance on the traditional meaning of the statutory language set out in *Community Blood Bank*, the Ninth Circuit recognized that the standards are indeed different. The court chose to apply the more "expansive view of 'profit'" (*id.* at 726) adopted by the Second Circuit in *AMA*: "tangible pecuniary benefits" to CDA members.

The folly of substituting a "spectrum of activities" analysis for the plain language of the statute can be seen in the kinds of activities held by the Ninth Circuit to constitute "tangible pecuniary benefits." Those benefits include: lobbying for insurance and Medicare reform, the regulation of members' advertising and solicitation, and providing continuing education. In addition, the court specifically included in its analysis of activities that could be counted as justifying Commission jurisdiction those that might "indirectly make members' practices more efficient and reduce their costs." *Id.* Thus, activities of an association that might benefit its members and also the public would give the Commission jurisdiction over a nonprofit entity.

In its law enforcement action against ACAM, the Commission has used the "pecuniary benefits" test to justify jurisdiction where the nature and substantiality of activities are truly at the far end of the spectrum, thereby demonstrating that this jurisdictional standard is being used as a means to regulate virtually any activity of any nonprofit association. After ACAM argued, during the course of the Commission's investigation, that it was exempt from jurisdiction under Section 4, Commission staff requested additional information to determine whether ACAM had done anything to promote the financial interests of its members. ACAM was asked for information on its expenditures for a variety of activities, including its scientific conferences, the publication and distribution of its scholarly journal and other publications, responding to public inquiries, and appearances before state legislative bodies and medical boards.

Most of the activities for which the staff sought information from ACAM are among those cited in the Commission's *AMA*

brief as educational and scientific "non-entrepreneurial" functions which, according to the Commission's position before the Second Circuit, do not count toward determining jurisdiction under the "pecuniary benefits" test. Furthermore, the total dollar amount represented by all these activities constituted only two to three percent of ACAM's budget; yet the staff still concluded that this was enough to trigger jurisdiction over ACAM. If two or three percent of a nonprofit organization's budget is sufficient to justify jurisdiction, and if continuing professional education and the dissemination of professional publications that contain information with which the Commission does not agree count as business activities for purposes of Section 4, then the prediction Commissioner Elman made in his *Community Blood Bank* dissent has been realized: the Commission can exercise its authority over the sale of cookies at a church bazaar.

The enforcement policies reflected by the positions the Commission has taken in its actions against both CDA and ACAM simply cannot be reconciled with the plain language of Section 4. If the Commission and the courts continue to use the "pecuniary benefits" test, and if all the activities enumerated in the AMA and CDA cases – and those identified by Commission staff in its investigation of ACAM – can support Commission jurisdiction over nonprofit associations, then there is no longer any meaningful limit to that jurisdiction.

The Ninth Circuit's adoption in this case of the "pecuniary benefits" analysis only confirms the wisdom of the *Community Blood Bank* test. While the Commission has long acknowledged that an association's educational efforts should

remain outside the agency's jurisdiction,[5/] the Ninth Circuit now lists continuing education of the members as one of the apparent bases for Commission jurisdiction over the association. *CDA* at 726. Similarly, although an association's effort to preserve the integrity of the profession by the legitimate regulation of its members' advertising is a laudable nonprofit objective, the Ninth Circuit cites such activity as evidence of the commercial nature of the CDA. *Id.* Moreover, both the Ninth and Second Circuits regard the exercise of a Constitutional right to petition a government body (*i.e.*, lobbying for regulatory reform) as evidence that the nonprofit association has turned to the business of operating for the profit of its members. *CDA* at 726; *AMA* at 448. Thus, in two circuits, any association that enhances the state of the science it studies, preserves the ethics its members observe, improves the quality of the care they provide, or advises regulators of the benefits and costs of public policies thereby risks subjecting itself to the jurisdiction of the Federal Trade Commission. This is not the law in the Eighth Circuit. More importantly, this cannot be what Congress intended when it prohibited the Commission from asserting authority over nonprofit associations.

II. FAILURE TO OBSERVE THE CONSTRAINTS OF SECTION 4 HAS ENCOURAGED THE COMMISSION TO BECOME A FEDERAL REGULATOR OF THE PRACTICE OF MEDICINE

After this Court divided on the Second Circuit's decision in *AMA*, the Association took its case to Congress and proposed

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5/ *See, e.g.*, the Commission's brief to the Second Circuit in *AMA*, *supra*.

legislation that would have diminished the FTC's authority by exempting state-licensed professionals from its jurisdiction altogether. Before Congress was the question whether the Commission was impermissibly intruding into the regulation of the services performed by professionals – so-called "quality of care" or "practice of medicine" issues traditionally regulated by the states. Responding to this jurisdictional threat, the FTC Chairman assured the Senate leadership that while the Commission had, over the years, examined certain practices of certain professionals and their organizations, the agency's activities did not

> derive from any desire to regulate the professions. . . . Our objective, in both our competition and our consumer protection activities, is to enhance the ability of informed consumers to act as ultimate regulators of the market. . . . . The Commission's activities in this area have not sought to interfere either with legitimate self-regulation or with the authority of the states to assure the quality of services to their citizens.

Letter from FTC Chairman James C. Miller, III to Honorable Bob Packwood, Chairman, Senate Comm. on Commerce, Science and Transportation and Honorable Bob Kasten, Chairman, Subcomm. on Consumer Protection (March 11, 1982).

A later letter from Chairman Miller to Senator Packwood confirmed that the FTC's interest in regulating professionals had historically extended only to "business practices" as

distinguished from quality of care issues or "scope" of practice. Letter from Chairman Miller to Honorable Bob Packwood (May 27, 1982). In characterizing the limitations on the Commission's regulation of professionals, Chairman Miller emphasized that the Commission's regulatory efforts are aimed only at "the illegal business practices of professionals" (Letter at 2, emphasis in original), not the regulated practices of members of nonprofit professional associations. In the wake of these representations, Congress declined to enact the AMA's proposed exemption.

Today, regulation of the quality of medical services to patients in the U.S. remains the responsibility of the states. This authority is typically exercised by state medical boards, whose primary responsibility is "to protect the public from the incompetent, unprofessional, improper, and unlawful practice of medicine, [and it] is determined by each state's medical practice act." Federation of State Medical Boards of the United States, Report of the Special Committee on Health Care Fraud at I-40 (April 1997). In 1995, the Federation of State Medical Boards of the United States, citing concern that recent legislative initiatives could restrict the ability of individual medical boards to regulate questionable health care practices, established a committee to develop recommendations to assist boards in "evaluating, investigating, and prosecuting physicians engaged in such practices." *Id.* The committee has reported its recommendations, and principal among them is the conclusion that collaboration between state medical boards and the FTC would be an effective way to "stop the spread of questionable health care practices." *Id.* at I-50. Specifically, the committee recommended that boards expand their liaison with the FTC in order to identify physicians who may be engaging in questionable health care practices (*id.* at I-42), use the FTC as

a source of information in their evaluation of such practices (*id.* at I-44), and coordinate with the FTC on avenues of potential prosecution against targeted physicians. *Id.* at I-46-47.

Prosecuting questionable health care practices or assisting state boards in their physician prosecutions is precisely contrary to the representations the Commission made to Congress during the AMA debates. Yet the Commission appears to have strayed in that direction in its zeal to thwart alternative medical treatments. A few months after the Commission opened its investigation of ACAM, an FTC representative addressed a meeting of the Federation of State Medical Boards. He advised the state board members that the Federal Trade Commission staff are beyond looking at claims, are sympathetic to problems the boards have had stopping certain medical practices, and are grateful to representatives of the boards for providing instruction to FTC staff on how to prosecute cases involving specific medical therapies. Matt Daynard, J.D., Remarks at the Annual Meeting of the Federation of State Medical Boards of the United States, 61-2 (April 11, 1996). This is just the kind of development that the AMA repeatedly predicted would occur if the professions were not exempt from Commission jurisdiction. If a Commission representative had come before the Federation of State Medical Boards in 1982, acknowledging the assistance of the boards in pursuing under the FTC Act cases the boards had been unable to successfully prosecute themselves, there is little doubt that the Commission would not have survived AMA's efforts to exempt professions from its jurisdiction.

There are other indications as well that the Commission is overstepping its jurisdictional boundaries by taking positions on the merits of certain medical therapies and communicating its

views directly to physicians. In the area of eye surgery, the Commission joined in the Food and Drug Administration's warning to doctors about appropriate standards that govern claims for medical procedures they might use. Letter on PRK promotion and advertising from Lillian J. Gill, Director, Office of Compliance, Center for Devices and Radiological Health, FDA and Dean C. Graybill, Associate Director, Division of Service Industry Practices, Bureau of Consumer Protection, FTC to Eye Care Professionals (May 7, 1996). In an advisory recently issued by the FTC on its website, the Commission also warns the public about the limitations of laser ocular surgery and invites consumers to contact the agency with questions or information concerning questionable practices. These activities cannot be meaningfully distinguished from the evaluation and regulation of medical procedures – the very area in which the FTC has repeatedly denied it has jurisdiction or regulatory interest. Of particular concern to ACAM is that if the agency intends to regulate medical practices, it can easily assert – under the amorphous "pecuniary benefits" standard – that its jurisdiction reaches associations that educate physicians or the public about those practices.

III. THE *COMMUNITY BLOOD BANK* TEST IS A PROPER INTERPRETATION OF SECTION 4, BUT THE DISTINCTION BETWEEN PROFIT-MAKING ACTIVITIES AND NONPROFIT SERVICES SHOULD BE CLARIFIED

The *Community Blood Bank* test articulates a meaningful limitation on the Commission's jurisdiction that is true to the language of Section 4. Its adoption would place appropriate constraints on the Commission, while not resulting in a "blanket exclusion" from jurisdiction for nonprofit

associations.[6/] ACAM respectfully submits that applying that test, the Commission lacks jurisdiction over nonprofit professional associations such as CDA and ACAM.

Although the *Community Blood Bank* standard is true to the statutory language compared to the "pecuniary benefits" test, it still leaves open to some question the kinds of activities that might bring a nonprofit association within the jurisdiction of the Federal Trade Commission. The distinction between profit-making activities and nonprofit services is especially difficult to draw in the context of professional associations. If the Commission can declare, by using the term "pecuniary benefits," that associations are generating profits for purposes of Section 4 when they provide continuing education to their members, then this federal agency can decide whether an association's instructors have properly substantiated and qualified their medical lectures. If the Commission can second-guess the decisions of an association that advises the public about therapies or regulates the expressed opinions of its members, then the agency can determine what the public learns about available care and how doctors communicate with their patients. If the Commission can assert jurisdiction over associations that educate regulators about the impact of public policies, then the agency can alter the course of state regulation of the professions.

These possible outcomes are problematic for associations of professionals, but the potential adverse effects on the public

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6/ In its opposition to CDA's petition for a writ of *certiorari* the Commission suggests such a result (Opp. 13), but a "blanket exclusion" for nonprofit entities is not sought in the case now before the Court, nor would an adoption of the *Community Blood Bank* test establish one.

health could be far more significant. Fifteen years ago, the AMA voiced concerns such as these to Congress and the courts. What once may have seemed a remote threat to principles of federalism now must be seen as an imminent danger. Only by clarifying the Commission's jurisdiction over professional associations can this Court allay those concerns.

Pecuniary benefits are not a meaningful benchmark for distinguishing profit making from public service. Continuing medical education, maintaining ethical standards and regulating the quality of care should remain the concern of the states and the professions they regulate. Professional associations that facilitate these processes are providing public services, but are at the same time providing services that have real, if indirect, pecuniary value to their members. A better educated doctor or dentist may indeed be more efficient and therefore more profitable. A more ethical advertiser may be more valuable to society and, in the long run, more profitable for the practice of medicine. Efforts to inform public policy may redound to the pecuniary benefit of doctors and dentists, as well as their patients. Consequently, associations that advance these goals on behalf of their members may provide services that members would gladly pay for. Such associations, however, were not the concern of Congress in 1914, and they should not be the concern of the Commission today.

ACAM urges the Court to instruct the Commission to apply a clarified version of the test that *Community Blood Bank* announced when the Commission first sought judicial recognition of "pecuniary benefits" as a means to circumvent the intended limitations of Section 4. The conflict in the circuits has allowed the Commission to put nonprofit associations on a par with commercial public corporations.

Until the agency is ordered to follow a clarified version of *Community Blood Bank* there is every reason to believe it will continue to threaten prosecution of and bring cases that Congress never intended it to undertake.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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